A Perspective on the New Affirmative Defense To Damages for Supervisor Sex Harassment

By Shelley A. Gregory* and Patricia A. Shiu**

In *Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal. 4th 1026, 6 Cal. Rptr. 3d 441, the California Supreme Court ruled that employers are strictly liable for hostile work environment sex harassment carried out by supervisors, but that employers may limit the amount of damages awarded to plaintiffs by proving the new affirmative defense articulated by the Court. The long-awaited decision has been considered a victory both for employees and employers, and the unanimous decision appears designed to strike a balance between the varying interests of employees and employers grappling with workplace harassment.

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FEDERAL V. STATE LAW

Although urged to import wholesale the now-familiar affirmative defense to employer liability under Title VII articulated in *Faragher v. City of Boca Raton*[1] and *Burlington Industries, Inc. v. Ellerth*[2], the Court instead crafted a new affirmative defense after undertaking an independent analysis of California's Fair Employment and Housing Act ("FEHA"). Now, when sex harassment claims are brought pursuant to the FEHA, employers will have the opportunity to plead and prove, by a preponderance of the evidence, the three elements of the affirmative defense: (1) that the employer has taken "reasonable steps to prevent and correct" harassment; (2) that the employee "unreasonably failed" to utilize the employer's measures; and (3) that such "reasonable use" of the measures "would have prevented at least some of the harm that the employee suffered." *McGinnis,* 6 Cal. Rptr. 3d at 452.

The Court's reasoning is perhaps as significant to plaintiffs as the holding itself. In declining to adopt the Title VII standard, the Court closely analyzed the distinctions between the FEHA and Title VII, reinvigorating the principle that where the language of the two statutes diverge, federal case law is not instructive.[3] The effect of the Court's rejection of federal precedents cannot be understated, as significant distinctions between the statutory schemes are readily apparent, and the result is often greater protection for employees under the state law. *See id.* at 448-49.

STRICT EMPLOYER LIABILITY

The Court's analysis confirmed the liability framework that plaintiffs' lawyers have long argued existed under the statute: that employers are strictly liable for harassment perpetrated by their supervisory employees.[4] The relevant language of the statute states that "[h]arassment of an employee, an applicant. . . by an employee *other than an agent or supervisor* shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[5] The Court reasoned that this language creates two standards for liability: a negligence standard for harassment by a non-supervisory coworker, and, by implication, a strict liability standard for harassment by an "agent or supervisor." To the extent that *Faragher* and *Ellerth* are grounded in agency law, the Court rejected their application here, finding nothing in the statute to suggest that either standard of liability is constrained by such principles. *McGinnis,* 6 Cal. Rptr. 3d at 449.

THE NEW AFFIRMATIVE DEFENSE TO DAMAGES

To balance its decision, the Court did, however, agree that *Faragher* and *Ellerth's* application of the common law avoidable consequences doctrine was relevant to its analysis of the FEHA,[6] and used the doctrine as a basis for the affirmative defense. *See id.* at 452.

While this new defense affirms that employers should be given a meaningful opportunity to resolve workplace harassment claims before employees turn to courts for relief, the Court's decision also sends a stern message to employers — that the affirmative defense will not provide safe harbor unless the employer can prove that subsequent damages could have been reasonably prevented by the employee. This requirement signals to employers and lower courts alike that both must be responsive to the myriad reasons any particular employee does not promptly bring a supervisor's harassment to an employer's attention. Among these, the Court cited a lack of adequate employer policies (or procedures to enforce them), a failure to communicate policies clearly, as well as a fear of reprisal or feelings of embarrassment, humiliation, and shame. *See id.* at 453. The decision explicitly recognizes the reality that it simply is not feasible to expect prompt employee complaints in every instance,[7] and makes abundantly clear that many factors will bear on the question of whether an

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employee's failure to complain was indeed reasonable under the circumstances, including an employer's past handling of sex harassment complaints.

Recitation of the affirmative defense in pleadings and production of an anti-harassment policy — without more — will not defeat a plaintiff's claim on summary judgment, as *McGinnis* clearly contemplates that the parties' reasonableness should be determined by the trier of fact. *Id.* at 452. Employers must proffer credible evidence not only that they have instituted an anti-harassment policy, but that they have continually sent the message to all employees, in word and deed, that complaints will be taken seriously and investigated thoroughly and confidentiality, and that harassment will be corrected promptly, with zero tolerance for retaliation.

The *McGinnis* Court has enhanced the expectation that employers will strive to effectively prevent and remedy workplace harassment, which is surely a victory for employees and employers alike. Employers have regularly asked courts and legislatures for the opportunity to take the first crack at resolving workplace harassment; the state's highest court has **now** mandated that they do so, or risk liability without limitation or defense.

ENDNOTES

1. (1998) 524 U.S. 775, 807.
2. (1998) 524 U.S. 742, 765. In these companion cases, the U.S. Supreme Court held that in the absence of a "tangible employment action," the employer may escape liability altogether by proving that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective oppportunities provided by the employer or to avoid harm otherwise."
3. *See, e.g., Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 74.
4. Though characterized as dicta by the defendant employer in this case, the Court definitively interpreted its previous pronouncement on strict liability as binding. *See McGinnis,* 6 Cal. Rptr. 3d at 449. *McGinnis* clearly invalidates the Ninth Circuit's 2001 finding that California courts had not definitively ruled on the issue, as well as its prediction that the state's highest court would not find employers strictly liable under the statute. *See Kohler v. Inter-Tel Technologies. Inc.* (9th Cir. 2001) 244 F.3d 1167.
5. Cal. Gov't Code § 12940(j)(l) (emphasis added).
6. In California, the doctrine embodies the principle that "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." *McGinnis,* 6 Cal. Rptr. 3d at 451. In this context, an employer may utilize the doctrine by pleading and proving the new defense.
7. The third prong allows employees greater leeway for failing to complain, as compared to the federal standard, where evidence of an employee's failure to use an internal complaint procedure "will normally suffice to satisfy" the employer's burden of demonstrating that the employee was unreasonable in failing to complain. *Faragher,* 524 U.S. at 807–808.

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